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Code,[33] providing that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The court could recognize that the word fault need not be limited in its meaning to negligence or wrongful intent, and hold that "fault" is present whenever one exposes another to injury by engaging in an ultrahazardous activity and in so doing causes injury. The acceptance of such a view would have the advantage of incorporating a form of strict liability into our law which would bring about the desired result in a manner not inconsistent with the Code.

If a form of strict liability were read into Article 2315, there would still remain the question of what to do with Article 667. If it is felt that the language of the article is in fact too broad, it is submitted that the application of the article might be limited to the adjudication of disputes between adjoining landowners involving typical "nuisance" situations.[34] It should be noted that such an interpretation[35] would not result in a literal application of the article, but would have the effect of introducing the concept of "unreasonableness" into the article. This interpretation would give the article meaning and at the same time serve to limit its broad and unqualified language.

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Attorney's Fees As An Element of Damages: The General Rule and Its Exceptions

In general the jurisprudence of Louisiana has not favored the allowance of attorney's fees as part of the damages to be

33. LA. CIVIL CODE art. 2315 (1870).

34. It would seem that the concepts of nuisance and of Article 667, as written, are quite similar in that they both purport to be rules for regulating disputes between adjoining proprietors over various uses of land. The chief distinction would appear to be in the nature of the interference. For an activity to be classified as a nuisance, the interference must be "unreasonable." On the other hand, any interference which is more than "some inconvenience" (Article 668) would appear to be a violation of Article 667 as written.

35. This interpretation of the article bears a close resemblance to the decision of the Supreme Court in *Devoke v. Yazoo & M.V.R.R.*, discussed above. See note 17, *supra*. Further, as pointed out above (see note 28 *supra*) the later Supreme Court cases which seem to be moving toward a rule resembling *Rylands*, do contain language suggesting that the type of liability involved is related to that of nuisance.

awarded for injuries to persons or property.[1] The courts have often stated the general rule that attorney's fees are not allowed except where authorized by statute or contract.[2] A number of exceptions to this general rule have developed. Attorney's fees have been allowed in cases involving illegally issued conservatory writs,[3] seizure and sale of property of a third person,[4] possessory actions,[5] actions in trespass,[6] and actions for separation from bed and board or divorce.[7] It is the purpose of this Comment to examine briefly the reasons for the general rule with emphasis on its exceptions and the reasons for their existence. In the treatment of the general rule several representative situations in which attorney's fees are authorized by statute or contract will be discussed.

THE GENERAL RULE

Origin and Reasons For It

The exact origin of the general rule is obscure. It was stated in the early case of *Melancon's Heirs v. Robichaud's Heirs*,[8] that "the fees, which parties have to pay to their counsel for asserting their rights in the courts of justice, *have never been*, nor can they be considered as costs, chargeable to the party cast. . . . The fees paid for professional services cannot either be allowed under the head of damages. . . ."[9] Although the exact origin of this rule could not be found, there are several possible reasons for its adoption by the courts.

1. See Bentley v. Fischer Lumber & Manufacturing Co., 51 La. Ann. 451, 25 So. 262 (1899).

2. Hernandez v. Harson, 237 La. 389, 111 So.2d 320 (1959); Breaux v. Simon, 235 La. 453, 104 So.2d 168 (1958); McNeill v. Elchinger, 231 La. 1090, 93 So.2d 669 (1957); Chauvin v. La Hitte, 229 La. 94, 85 So.2d 43 (1956); Griffing v. Bank of Abbeville & Trust Co., 228 La. 857, 84 So.2d 437 (1955); Brantley v. Tugwell, 223 La. 763, 66 So.2d 800 (1953); Efner v. Ketteringham, 217 La. 719, 47 So.2d 331 (1950); Rhodes v. Collier, 215 La. 754, 41 So.2d 669 (1949).

3. See Department of Conservation v. Reardon, 200 La. 491, 8 So.2d 353 (1942); Edwards v. Wiseman, 198 La. 382, 3 So.2d 661 (1941); Three Rivers Oil Co. v. Laurence, 153 La. 224, 95 So. 652 (1923).

4. Soniat v. Whitmer, 141 La. 235, 74 So. 916 (1917); Ludeling v. Garrett, 50 La. Ann. 118, 23 So. 94 (1898); Gilkerson-Sloss Commission Co. v. Yale, 47 La. Ann. 690, 17 So. 244 (1895); Chappuis v. Waterman, 34 La. Ann. 58 (1882); Willis v. Scott, 33 La. Ann. 1026 (1881).

5. Williams v. Harmanson, 41 La. Ann. 702, 6 So. 604 (1889); De Graauw v. Eleazar, 24 So.2d 180 (La. App. 1945); Vidrine v. Vidrine, 130 So. 244 (La. App. 1930).

6. Cooper v. Cappel, 29 La. Ann. 213 (1877). *Cf.* Williams v. Harmonson, 41 La. Ann. 702, 6 So. 604 (1889); Vidrine v. Vidrine, 130 So. 244 (La. App. 1930). See also Morgan v. Patin, 47 So.2d 91 (La. App. 1950) (allows attorney's fees for an intentional or malicious act).

7. E.g., Tanner v. Tanner, 229 La. 399, 86 So.2d 80 (1956).

8. 19 La. 357 (1841).

9. *Id.* at 360.

One possible explanation for the adoption of this rule is that Article 1934, dealing with the measure of damages, and Article 2315 of the Civil Code[10] do not authorize the recovery of remote damages, and to allow the recovery of attorney's fees is to allow the recovery of remote damages.[11] The fact that this rule is generally accepted by the courts of the other states,[12] and by the federal courts[13] may also have been a factor in its adoption. The reason for not allowing attorney's fees to every successful defendant as part of the costs seems clear. This would prevent many people from asserting their rights for fear that if they should lose they would be exposed to the heavy penalty of paying the fees of defendant's counsel.[14] On the other hand it was perhaps felt that the parties should come into court on an equal footing and that to allow these expenses to the plaintiff which are never allowed to a successful defendant would give the plaintiff an unfair advantage in the contest.[15]

Under the general rule attorney's fees may be recovered when authorized by statute or contract and several typical situations in which they are provided for by statute or contract will now be discussed.

Recovery Under Statute

Many of the numerous statutes dealing with attorney's fees are directed to state agencies and have to do with the employment and compensation of attorneys by the agencies.[16] There

10. LA. CIVIL CODE (1870).

11. See Stewart v. Sowles, 3 La. Ann. 464 (1848), in which this reasoning is used. This does not seem to be a satisfactory explanation of *why* attorney's fees are considered an item of remote damages, however, but is rather a conclusion that they are considered as remote damages.

12. E.g., Baird v. Gibberd, 32 Idaho 796, 189 Pac. 56 (1920); McGaw v. Acker, M. & C. Co., 111 Md. 153, 73 Atl. 731 (1909).

13. E.g., Tullock v. Mulvane, 184 U.S. 497 (1902); Parks v. Boot, 102 U.S. 96 (1880).

14. See Smith v. Bradford, 17 La. 263 (1841), in which it is said: "Were we, in this instance, to give damages on account of supposed analogy between the two cases, we see no reason why we should not be called upon hereafter to allow them in every case; for the party enjoining the execution of an order of seizure and sale might be viewed as standing in the position of an ordinary defendant. After a while the lawyer's fees of every successful defendant would be claimed as a matter of course, and would become a part of the costs to be paid in every suit. This, we believe, would be contrary not only to law but to sound policy and justice; it would be closing the doors of our courts on a large class of suitors, who would not dare to assert their rights lest they should expose themselves to a heavy penalty, in case they should not be able to support their demands by sufficient evidence." *Id.* at 266.

15. See 15 AM. JUR. DAMAGES § 142 (1938).

16. E.g., LA. R.S. 47:1512 (1950) (department of revenue); *id.* 48:111 (department of highways).

are, however, a number of other provisions which allow the plaintiff to recover his attorney's fees.[17] It is provided, for example, in the Insurance Code that the insurer shall be liable for a penalty and reasonable attorney's fees for failure to pay any claim within sixty days after receipt of satisfactory proofs of loss when such failure to pay is found to be arbitrary, capricious, or without probable cause.[18] Another statute makes the surety on a bond liable for ten per cent attorney's fees on the amount recovered when the surety's failure to pay his obligation on the bond makes it necessary for the creditor to sue for collection.[19] Apparently these provisions are designed to encourage insurers and sureties to pay their obligations in good faith. It is also provided that any employee who receives less than the legal minimum wage may recover in a civil action the full amount of the legal minimum wage, together with costs and attorney's fees to be fixed by the court.[20] This provision would appear to be intended to discourage violations of the minimum wage law. Since these laws imposing attorney fees without contract are penal, they must be strictly interpreted and applied.[21] It can be seen from these examples that there are usually sound policy reasons behind statutes which allow the plaintiff to recover attorney fees in particular situations.

Recovery Under Contract

Under Louisiana law parties are accorded full freedom to contract as long as their stipulations are not contrary to law, good morals, or public policy.[22] Since neither law nor public order forbid, it, attorney's fees are properly includable as an element of damages in contracts. For example, it is a general practice for the contracting parties in the execution of a mortgage to include a stipulation that the mortgagor will pay as attorney's fees a certain percentage of the principal and interest owed if it is necessary to institute suit against him to enforce his obligation on the contract. Also, parties to a note may stipulate for

17. E.g., *id.* 9:3902 (failure of surety to pay); *id.* 22:658 (failure of insurance company to pay); *id.* 23:364 (failure to pay employees); *id.* 38:2246 (claims of materialmen and laborers on public works); *id.* 45:454 (enforcement of railroads' obligation to relieve natural drainage).

18. *Id.* 22:658.

19. *Id.* 9:3902.

20. *Id.* 23:364.

21. Hortman-Salmen Co. v. Continental Casualty Co., 170 La. 879, 129 So. 515 (1930).

22. LA. CIVIL CODE art. 11 (1870). See Morris Buick Co. v. Ray, 43 So.2d 83 (La. App. 1949).

attorney's fees in the event payment is not made at maturity. In such a case, the provision for attorney's fees is one for liquidated damages, and the fees are recoverable in an action on the note without proof that they were incurred.[23]

Where the terms of a contract are doubtful as to the inclusion of attorney's fees as damages, a demand for attorney's fees will be rejected.[24] Similarly it has been held that a provision in a contract providing for payment of the fees of the attorney retained to collect on the contract will cover only an action for collection, and will not cover an action for damages for breach of the contract.[25]

EXCEPTIONS TO THE GENERAL RULE

As has been pointed out, this is not a complete discussion of the application of the general rule, but is rather a brief introduction into the types of situations in which attorney's fees are authorized as an element of damages by statute and contract. The most troublesome phase of the problem, the exceptions to this general rule, will now be studied in detail.

Illegally Issued Conservatory Writs[26]

It is now well settled that attorney's fees are allowed as damages when conservatory writs have been dissolved on motion and not on defenses applicable to the merits.[27] The reason for the concession in cases involving illegally issued conservatory writs is that these writs, involving the harsh and extraordinary powers of the court, should not be lightly resorted to.[28] In making the illegal seizure, the seizing creditor has committed a tort or quasi offense for which he is responsible in damages, including attorney's fees.[29]

It is, however, difficult to recover attorney's fees under this exception. It appears that they can be recovered only when a

23. First Nat. Bank v. Mayer, 129 La. 981, 57 So. 308 (1912).
24. Godchaux v. Hyde, 126 La. 187, 52 So. 269 (1910).
25. Ever-Tite Roofing Co. v. Green, 83 So.2d 449 (La. App. 1955).
26. For an excellent discussion of the law concerning attorney's fees in illegally issued conservatory writs which goes into much more detail than the present discussion, see Comment, 12 LOUISIANA LAW REVIEW 433 (1952).
27. See, e.g., Department of Conservation v. Reardon, 200 La. 491, 8 So.2d 353 (1942); Edwards v. Wiseman, 198 La. 382, 3 So.2d 661 (1941); Three Rivers Oil Co. v. Laurence, 153 La. 224, 95 So. 652 (1923), *Cf.* United Mine Workers v. Arkansas Oak Flooring Co., 238 La. 108, 113 So.2d 899 (1959).
28. See Soniat v. Whitmer, 141 La. 235, 244, 74 So. 916, 919 (1917).
29. *Ibid.*

successful motion to dissolve the writ has been separately filed, tried, and decided.[30] The motion cannot even be referred to the merits without precluding any subsequent claim for attorney's fees.[31] Although no case was found on the point, it would seem that if the referral to the merits is completely arbitrary, attorney's fees should be allowed. The theory of this rule is that unless the motion is tried separately, it is impossible to separate the portion of the attorney's services rendered in dissolving the writ from that directed toward defeating the main demand.[32] This position was not always taken by the courts, and in the early cases the practice of *apportioning* the attorney's services was followed.[33] Attorney's fees were allowed for the dissolution of illegally issued writs whether the writs were dissolved on motion or rule,[34] on motion or rule referred to and tried with the merits,[35] or simply upon the trial of the merits.[36] Notwithstanding the earlier practice of apportioning the attorney's services, it seems clear now that if attorney's fees are to be recovered it is necessary that the motion to dissolve be tried separately from the merits.

Injunction To Arrest Seizure and Sale

When property is seized as the property of the judgment debtor and the owner is forced to enjoin the seizure and have it set aside, the situation is similar to that of the illegally issued conservatory writ. In both situations there has been an abuse of the judicial process and the seizing creditor has committed a tort for which he is liable in damages.[37]

There are a number of cases holding that when the owner is

30. E.g., Department of Conservation v. Reardon, 200 La. 491, 8 So.2d 353 (1942); Dehan v. Youree, 166 La. 635, 117 So. 745 (1928); Farris v. Swift, 156 La. 12, 99 So. 893 (1924).

31. See cases cited note 30 *supra*.

32. See Farris v. Swift, 156 La. 12, 99 So. 893 (1924).

33. Gray, Macmurdo & Co. v. Lowe & Pattison, 11 La. Ann. 391 (1856); Dyke v. Walker, 5 La. Ann. 519 (1850); Penny v. Taylor, 5 La. Ann. 713 (1850); Jones v. Doles, 3 La. Ann. 588 (1848); Melancon's Heirs v. Robichaud's Heirs, 19 La. 357 (1841). See Comment, 12 LOUISIANA LAW REVIEW 433 (1952), wherein the author cites these cases and many more and concludes that it is not actually impossible to differentiate between the attorney's services for dissolving the attachment, and those for defending the suit.

34. E.g., Yun Loy v. Rosser, 52 La. Ann. 1723, 28 So. 251 (1900); Macfarland & Dupre v. Lehman, Abraham & Co., 36 La. Ann. 351 (1886).

35. E.g., American Hoist and Derrick Co. v. Frey, 127 La. 183, 53 So. 486 (1910); Hernsheim & Bro. v. Levy, 32 La. Ann. 340 (1880).

36. E.g., Dyke v. Walker, 5 La. Ann. 519 (1850); Melancon's Heirs v. Robichaud's Heirs, 19 La. 357 (1841).

37. See Soniat v. Whitmer, 141 La. 235, 74 So. 916 (1917).

forced to secure an injunction, he is entitled to attorney's fees as an element of damages.[38] There are other cases which have disallowed recovery of the attorney's fees in such situations.[39] These cases were discussed at length in *Soniat v. Whitmer*[40] and *Jackson v. Bouanchaud.*[41] In both of these cases the plaintiffs brought suit to enjoin the seizure and sale of their property by the defendants in execution of a judgment obtained against another person. It was held in the *Soniat* case that such seizure by the defendants was a quasi offense for which they were responsible in damages, including the fees of counsel for obtaining the writ of injunction.[42] It should be noted that this decision did not require that the seizing creditor have seized with malice or without probable cause. In fact the court in the original opinion said that it made no difference that the seizure was made in honest error inasmuch as the error, honest or not, made it necessary for plaintiff to employ counsel for protecting his property from seizure under a judgment to which he was a total stranger. In the *Jackson* case, however, it was held that the plaintiff was not entitled to attorney's fees because defendant had seized the property in complete good faith.[43] The court attempted to explain *Soniat* and the decisions upon which it relied on the ground that the underlying principle in those cases and the one to be followed in the instant one was that where a judgment creditor seizes the property of a third person without the exercise of due diligence and without probable cause, or with malice, such seizure amounts in law to a trespass and a tort, and gives rise to an action for damages. The seizure being a gross abuse of the judicial process, the court requires the seizing creditor to pay attorney's fees as an element of damages.[44] It is not clear that this was the underlying principle in the *Soniat* case and the ones upon which it relied. As has already been pointed out the court in the *Soniat* case did not require that the seizing creditor have seized with malice or without probable cause. The then Chief

38. *Ibid.*; Ludeling v. Garrett, 50 La. Ann. 118, 23 So. 94 (1898); Gilkerson-Sloss Commission Co. v. Yale, 47 La. Ann. 690, 17 So. 244 (1895); Chapuis v. Waterman, 34 La. Ann. 58 (1882); Willis v. Scott, 33 La. Ann. 1026 (1881).

39. Jackson v. Bouanchaud, 178 La. 26, 150 So. 567 (1933); Campbell v. Short, 35 La. Ann. 465 (1883); Bank of New Orleans v. Toledan & Taylor, 20 La. Ann. 571 (1868); Nevu v. Voorhies, 14 La. Ann. 738 (1859); Dykes v. Dyer, 14 La. Ann. 701 (1859).

40. 141 La. 235, 74 So. 916 (1917).

41. 178 La. 26, 150 So. 567 (1933).

42. 141 La. 235, 74 So. 916 (1917).

43. 178 La. 26, 150 So. 567 (1933).

44. *Id.* at 41, 150 So. at 570.

Justice suggested in his dissenting opinion that there was a conflict in the jurisprudence and that the court should avail itself at that time of the opportunity to overrule one line or the other of the conflicting decisions.[45] The question of which line will be followed to the exclusion of the other still has not been answered. At least one subsequent court of appeal case has allowed attorney's fees where there was no showing that the seizure was made with malice or in bad faith.[46] It appears, however, from a recent Supreme Court decision that attorney's fees will not be allowed when the seizing creditor acts in good faith and without malice.[47] It should be noted that an additional reason the fees were disallowed in that case was because the plaintiff had not obtained an injunction but had only filed a third opposition which was maintained on the merits.[48]

Possessory Actions

There is a conflict in the jurisprudence as to whether attorney's fees will be allowed as an element of damages in a possessory action. One early Supreme Court case in which the plaintiffs were evicted with threats and violence held that plaintiffs were entitled to attorney's fees.[49] This case has been followed in the Court of Appeal, First Circuit, in one case in which it appears that there was force and violence[50] and in one in which it appears that there was no force and violence.[51] The Courts of Appeal, Second Circuit[52] and Orleans,[53] have taken an opposite position. In *Bryson v. George*[54] the Second Circuit Court of Appeal stated that they did not find any authority for the allowance of attorney's fees in possessory actions, and accordingly rejected claims for such. Although this case is subsequent to the

45. Soniat v. Whitmer, 141 La. 235, 74 So. 916 (1917). See also Jackson v. Bouanchaud, 178 La. 26, 150 So. 567 (1933), in which Chief Justice O'Niell reiterates his views that there is an irreconcilable conflict in the jurisprudence on this subject and that the attempt of the majority to reconcile the conflicting decisions only shows that reconciliation is impossible.

46. Sims v. Matassa, 200 So. 666 (La. App. 1941).

47. See Hernandez v. Harson, 237 La. 389, 410, 111 So.2d 320, 327 (1959), where the court states that "Attorney's fees should not be allowed as an element of damage in this case for the further reason that the seizing creditor acted in good faith and without malice, nor was the seizure characterized by harshness and total disregard for the interests of Hernandez."

48. *Ibid.*

49. Williams v. Harmanson, 41 La. Ann. 702, 6 So. 604 (1889).

50. Vidrine v. Vidrine, 130 So. 244 (La. App. 1930).

51. De Graauw v. Eleazar, 24, So.2d 180 (La. App. 1945).

52. Bryson v. George, 31 So.2d 492 (La. App. 1947). *Contra*: Wright v. Holder, 72 So.2d 529 (La. App. 1953).

53. Miller v. Welsh, 66 So.2d 25 (La. App. 1953).

54. 31 So.2d 492 (La. App. 1947).

cases allowing attorney's fees, those cases were not mentioned by the court in its opinion. It may be that those cases were not called to the attention of the court.

In two recent cases the Supreme Court has stated that it entertains doubt that attorney's fees are an actionable element of damages in an ordinary possessory action.[55] These statements were mere obiter, however, as the court preferred to dispose of the issue of attorney's fees on the ground that even in cases where attorney's fees are allowed, absence of proof that the fees have actually been paid, or an obligation incurred to pay, defeats recovery.

Trespass

Closely analogous to the possessory action is the action in trespass. There is some jurisprudence supporting an award of attorney's fees as an element of damages in such actions. In the early case of *Cooper v. Cappel*[56] the act of trespass was accompanied by force and aggravation. The court said that in fixing the damages the jury might well consider the trouble and expense to which the plaintiffs had been subjected by the wrongful act of the defendants, and that it was proper to take into account as part of the expense the reasonable fees of attorneys. In reliance upon this case the Court of Appeal, First Circuit, has allowed attorney's fees where the damage is the result of an intentional or malicious act.[57] *Williams v. Harmanson*,[58] although technically a possessory action, also involved elements of trespass, force, and violence and is often cited with the *Cooper* case as authority for allowing attorney's fees. Although these cases have not been overruled, their soundness has been questioned by the Supreme Court.[59] It should also be noted that in a recent trespass case the Supreme Court struck out a claim for attorney's fees for the purpose of determining appellate jurisdiction.[60] It does not appear that *Cooper v. Cappel* and *Williams v. Harmanson* were considered by the court.

55. Efner v. Ketteringham, 217 La. 719, 47 So.2d 331 (1950); Rhodes v. Collier, 215 La. 754, 41 So.2d 669 (1949).
56. 29 La. Ann. 213 (1877).
57. Morgan v. Patin, 47 So.2d 91 (La. App. 1950).
58. 41 La. Ann. 702, 6 So. 604 (1889).
59. Efner v. Ketteringham, 217 La. 719, 47 So.2d 331 (1950); Rhodes v. Collier, 215 La. 754, 41 So.2d 669 (1949).
60. Breaux v. Simon, 235 La. 453, 104 So.2d 168 (1958).

Separation and Divorce

It is apparently settled that attorney's fees incurred by the wife in prosecuting a suit for separation from bed and board or divorce are the obligation of the community, whether she is successful or not.[61] Since there is no contract or statute which imposes this liability, it is a creature of the jurisprudence.[62] The attorney's fees are allowed because if the wife had no property of her own and could not bind the community, she would have difficulty employing an attorney to defend her rights in a separation or divorce suit.

In *Franks v. Franks*[63] it was held that where there is no community property at the time of the divorce, the husband cannot be condemned to pay attorney's fees to the wife because the obligation is one of the community and there is no liability on the part of the husband separately. The dissent suggested that the fact that there were no community assets with which to pay this community obligation was immaterial.[64] This position was predicated upon Article 2409 of the Civil Code,[65] which provides that the marriage partners are equally liable for their share of the debts contracted during the marriage, and not acquitted at the time of its dissolution. The wife, however, has the privilege of exonerating herself from the debts contracted during the marriage by renouncing the partnership or community of gains.[66]

In all cases in which attorney's fees have been allowed, the wife has appeared either as plaintiff or plaintiff in reconvention.[67] The Supreme Court has said, however, that the same principle would apply when it becomes necessary for the wife to employ counsel to defend a suit for separation from bed and board or divorce, and to protect her rights therein.[68] This is particularly true where a dissolution and settlement of the community is involved and it is necessary to employ counsel to protect her property interests. This is also consistent with the theory that such debts are community debts, properly payable out of the community.

61. E.g., Tanner v. Tanner, 229 La. 399, 86 So.2d 80 (1956); Collins v. Collins, 194 La. 446, 193 So. 702 (1940); Spiller v. Spiller, 170 La. 813, 129 So. 212 (1930); Balfe v. Balfe, 165 La. 283, 115 So. 489 (1928); Lester v. Lester, 160 La. 708, 107 So. 499 (1926).

62. See Tanner v. Tanner, 229 La. 399, 405, 86 So.2d 80, 82 (1956).

63. 236 La. 122, 107 So.2d 415 (1958).

64. *Id.* at 127, 107 So.2d at 417.

65. LA. CIVIL CODE (1870).

66. *Id.* arts. 2410, 2411.

67. See cases cited note 61 *supra.*

68. See Tanner v. Tanner, 229 La. 399, 86 So.2d 80 (1956) (dictum).

SUMMARY AND CONCLUSION

The question of when attorney's fees will be allowed in the absence of statute or contract is not one that is easily answered. It seems to be well settled that attorney's fees will be allowed when illegally issued conservatory writs are dissolved on motion and not on defenses applicable to the merits. It also appears that an owner who enjoins the seizure and sale of his property by a judgment creditor in execution of his judgment against another will be entitled to attorney's fees if such seizure is made in bad faith or without probable cause. It is doubtful that attorney's fees will any longer be awarded in possessory actions or actions in trespass. Attorney's fees incurred by the wife in prosecuting a suit for separation from bed and board or divorce may be awarded, whether she is successful or not. It should be noted that even in cases where attorney's fees are allowed, absence of proof that they have been paid or an obligation has been incurred to pay will defeat recovery.

It has been pointed out that the basis of recovery of attorney's fees in those cases involving wrongfully issued conservatory writs or illegal seizure of third persons' property is that the seizing creditor has abused the judicial process. He has thereby committed a tort which is actionable in damages. It is hard to see how these cases of trespass resulting from an abuse of judicial process differ logically from other cases of tort. It appears that if attorney's fees may properly be allowed in one case they should be allowed in the other, but the Supreme Court is certainly not willing to allow attorney's fees in all tort cases. Allowance of attorney's fees in these cases is in the nature of a penalty designed to deter abuse of the judicial process. This appears to be a sound policy reason for allowing attorney's fees in these cases. It does not appear that any such policy reasons as this exist for the allowance of attorney's fees in possessory actions or actions in trespass and it is believed that they should not be allowed. There does not appear to be any question about the soundness of awarding attorney's fees incurred by the wife in prosecuting a suit for separation from bed and board.

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